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Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

**FCC-12M-16**  
09215

In re

**MARITIME COMMUNICATIONS/LAND  
MOBILE, LLC**

Participant in Auction No. 61 and Licensee of  
Various Authorizations in the Wireless Radio  
Services

Applicant for Modification of Various  
Authorizations in the Wireless Radio Services

Applicant with **ENCANA OIL AND GAS  
(USA), INC.; DUQUESNE LIGHT  
COMPANY; DCP MIDSTREAM, LP;  
JACKSON COUNTY RURAL  
MEMBERSHIP ELECTRIC  
COOPERATIVE; PUGET SOUND  
ENERGY, INC.; ENBRIDGE ENERGY  
COMPANY, INC.; INTERSTATE POWER  
AND LIGHT COMPANY; WISCONSIN  
POWER AND LIGHT COMPANY; DIXIE  
ELECTRIC MEMBERSHIP  
CORPORATION, INC.; ATLAS PIPELINE  
- MID CONTINENT, LLC; DENTON  
COUNTY ELECTRIC COOPERATIVE,  
INC., DBA COSERV ELECTRIC; AND  
SOUTHERN CALIFORNIA REGIONAL  
RAIL AUTHORITY**

For Commission Consent to the Assignment of  
Various Authorizations in the Wireless Radio  
Services

EB Docket No. 11-71  
File No. EB-09-IH-1751  
FRN: 0013587779

Application File Nos. 0004030479,  
0004144435, 0004193028, 0004193328,  
0004354053, 0004309872, 0004310060,  
0004314903, 0004315013, 0004430505,  
0004417199, 0004419431, 0004422320,  
0004422329, 0004507921, 0004153701,  
0004526264, 0004636537,  
and 0004604962

**MEMORANDUM OPINION AND ORDER**

**Issued: March 9, 2012**

**Released: March 9, 2012**

**Preliminary Statement**

1. On February 13, 2012, Warren C. Havens ("Havens") filed three pleadings: (1) SkyTel Request for Leave to File; (2) SkyTel Reminder of Service Address, Complaint of Ex Parte

Presentation; and (3) SkyTel Request for Equitable Extension of Time. Each pleading was signed "Warren C. Havens" in his capacity of president of SkyTel entities.<sup>1</sup> None of the pleadings was signed by an attorney. Mr. Havens has not identified any lawyer or law firm representing himself and SkyTel entities since prior attorneys withdrew their representation. Therefore, Mr. Havens was appearing *pro se* since January 25, 2012 and there are myriad examples of his conduct. As discussed below, it is held that Mr. Havens is not authorized or permitted to appear *pro se* on behalf of any corporate entity including any entity doing business under the SkyTel umbrella.

## **Relevant Facts**

### **Withdrawal of Counsel**

2. On June 13, 2011, a Notice of Appearance (NOA) was filed by the law firm of Drinker Biddle & Reath, LLP ("Drinker") appearing as counsel for Mr. Havens and SkyTel. Afterwards, on January 12, 2012, without providing a descriptive reason, Drinker filed Emergency Motion for Withdrawal as Counsel for the Havens group, pursuant to Rules 1.7 and 1.16 (a) of the District of Columbia Rules of Professional Conduct.<sup>2</sup> Drinker would continue meeting its obligation for the transfer of files to new counsel.<sup>3</sup> But since that date, SkyTel has been without counsel in this proceeding.

3. Drinker's emergency motion to withdraw as counsel for SkyTel<sup>4</sup> relied on Rule 1.7 of the District of Columbia Rules of Professional Conduct. Rule 1.7 (general rule for conflict of interest) provides:

- (a) A lawyer shall not advance two or more adverse positions in the same matter.
- (b) Except as permitted by paragraph (c) below, a lawyer shall not represent a client with respect to a matter if:
  - (1) That matter involves a specific party or parties and a position to be taken by that client in that matter is adverse to a position taken or to be taken by another client in the same matter even though that client is unrepresented or represented by a different lawyer;
  - (2) Such representation will be or is likely to be adversely affected by representation of another client;
  - (3) Representation of another client will be or is likely to be adversely affected by such representation;
  - (4) The lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected by the lawyer's responsibilities to or

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<sup>1</sup> SkyTel entities: Environmental LCC; Intelligent Transportation and Monitoring Wireless, LLC; Skybridge Spectrum Foundation; Telesaurus Holdings GB, LLC; Verde Systems, LLC; and V2G, LLC.

<sup>2</sup> See *SkyTel In Camera Objections and Opposition Information, re Drinker Motion to Withdraw* (filed January 25).

<sup>3</sup> See *Order FCC 12M-7*, p. 2 (issued January 27).

<sup>4</sup> See *Drinker's Emergency Motion for Withdrawal as Counsel* (filed January 13).

interests in a third party or the lawyer's own financial, business, property, or personal interests.<sup>5</sup>

4. In Supplement to Emergency Motion for Withdrawal, Drinker clarified its need for withdrawal.<sup>6</sup> Rule 1.16 (termination of representation of a party by counsel) provides:

(a) Except as stated in paragraph (c), a lawyer ---- shall withdraw from the representation of a client if:

(1) The representation will result in violation of the Rules of Professional Conduct or other law.<sup>7</sup>

According to Drinker, the conflict is not a conflict of interest between SkyTel and another Drinker client, but a conflict between the client SkyTel and attorney Drinker. Drinker pleaded that the nature of the conflict made it "impossible" for Drinker to continue in its representation of SkyTel and required immediate termination of its representation of SkyTel.<sup>8</sup> There appears to have been a non-negotiable *impasse* between lawyer and client. However, Drinker recognizes its duty to the tribunal and continues to assure that it will dutifully comply with SkyTel's instructions for transfer of SkyTel's files to successor counsel and "provide reasonable assistance" in completing an orderly transition.<sup>9</sup>

#### **New Counsel Not Yet Obtained**

5. The situation was discussed at length at the Prehearing Conference of January 25, 2012. (Tr. 303-311). Mr. Havens said that there was "No attempt at delay" in his search for a new lawyer. (Tr. 303). He reported: "I am going through certain legal counsel I have around the country, and I am doing some screening and checking and I have some tips coming up." (Tr. 304). It seemed clear and some what convincing from this record that Mr. Havens was seeking to obtain new counsel soon. But that has not been the case. Also, this woeful situation has detracted from addressing flagging discovery and trial preparation.

6. The Presiding Judge regretfully has found it necessary to order Mr. Havens to obtain counsel; to instruct Maritime to withhold document production to SkyTel until new counsel was retained; and to require that counsel to sign the Protective Order.<sup>10</sup>

#### **Only Licensed Counsel May Represent the SkyTel Entities**

7. The Commission's rules of practice govern corporate representation in formal proceedings. The relevant rule appears in Section 1.21(d) and provides:

Except as otherwise expressly provided in this chapter, a duly authorized

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<sup>5</sup> D.C. R. Prof'l Conduct 1.7.

<sup>6</sup> See *Drinker's Supplement to Emergency Motion for Withdrawal as Counsel* (filed January 19, 2012).

<sup>7</sup> D.C. R. Prof'l Conduct 1.16(a)(1).

<sup>8</sup> See *Drinker's Supplement to Emergency Motion for Withdrawal as Counsel*, p. 2 (filed January 19, 2012).

<sup>9</sup> *Id.* at p. 3.

<sup>10</sup> See *Order FCC 12M-7*, pp. 2-3 (issued January 27); See *Order FCC 12M-11*, p. 2 (issued February 16, 2012).



*corporate officer or employee may act for the corporation in any matter which has not been designated for an evidentiary hearing and, in the discretion of the presiding officer, may appear and be heard on behalf of the corporation in an evidentiary hearing proceeding.*<sup>11</sup> (Emphasis added.)

This limitation is no doubt based on an the English common law principle that corporations and partnerships are non-personal entities and therefore, such non-persons must be represented in formal proceedings by authorized legal counsel.<sup>12</sup>

8. The general rule on *pro se* appearances was intended only for those lesser cases involving individuals that are not business entities. Officers of corporations and such can perform ministerial acts such as Commission filings and appearing at investigations and inquiries not involving APA formal adjudication. Even confirmed by Mr. Havens' own admission that "this is a formal hearing"<sup>13</sup>, this proceeding is subject to formal procedures and substantive requirements beyond those that normally apply in routine regulatory matters. Hence, relying on the underlying principle and at the discretion of the Presiding Judge, Mr. Havens cannot appear in this complex proceeding acting as counsel on behalf of himself and SkyTel.<sup>14</sup> It follows, as the Presiding Judge has long ago ordered<sup>15</sup>, that Mr. Havens must obtain new counsel for SkyTel immediately in order for these proceedings to continue with SkyTel's active participation.

### **Specific Requirements for Counsel Representing Corporations**

9. There is ample local precedent for these conclusions. The District of Columbia Court of Appeals' rules of practice provide with respect to representation in Rule 49(a):

No person shall engage in the practice of law in the District of Columbia or in any manner hold out as authorized or competent to practice law in the District of Columbia unless enrolled as an active member of the District of Columbia Bar, except as otherwise permitted by these rules.<sup>16</sup>

The "practice of law" is defined as "the provision of professional legal advice or services where there is a client relationship of trust or reliance."<sup>17</sup> The forms of conduct that is recognized as practicing law include (but are not limited to): preparing any legal documents...intended to affect or secure legal rights<sup>18</sup>, preparing or expressing legal opinions<sup>19</sup>, appearing or acting as an

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<sup>11</sup> 47 C.F.R. § 1.21(d).

<sup>12</sup> "It has been the law for the better part of two centuries...that a corporation may appear in the federal courts only through licensed counsel." *Rowland v. California Men's Colony, Unit II Men's Advisory Council*, 506 U.S. 194, 201-02 (1993); [It is the] "longstanding rule that corporations and other unincorporated associations must appear in court through an attorney." *D-Beam Ltd. Partnership v. Roller Derby Skates, Inc.*, 366 F.3d 972, 973-74 (9<sup>th</sup> Cir. 2004) (emphasis added); See *Maritime Response to SkyTel Filing I*, p. 3 (filed February 23).

<sup>13</sup> *Warren Havens' e-mail to Secretary Marlene H. Dortch that was directed to the attention of the Office of Administrative Law Judges* (addressing the Drinker motion to dismiss and the USDC action related to this FCC hearing) (sent on January 23).

<sup>14</sup> For the scope of "SkyTel" entities see Fn. 1, *supra*.

<sup>15</sup> See *Order FCC 12M-7*, p. 2 (issued January 27).

<sup>16</sup> D.C. App. R. 49(a).

<sup>17</sup> D.C. App. R. 49(b)(2).

<sup>18</sup> D.C. App. R. 49(b)(2)(A).

<sup>19</sup> D.C. App. R. 49(b)(2)(B).

attorney in any tribunal<sup>20</sup>, and preparing any claims, demands or pleadings of any kind, or any written documents containing legal argument or interpretation of law for filing in any court, administrative agency or other tribunal.<sup>21</sup>

### No Exception Applies

The District Court of Appeals has narrowed the exceptions to Rule 49 and except for one, none apply to this proceeding. The sole exception is contained in Rule 49(c)(11) concerning "Limited Practice for Corporations, which provides for:

Appearing in defense of a corporation or partnership in a small claims action, or in settlement of a landlord-tenant matter, through an authorized officer, director, or employee of the organization, provided:

- (A) the organization must be represented by an attorney if it files a cross-claim or counterclaim, or if the matter is certified to the Civil Action Branch<sup>22</sup>; and
- (B) the person so appearing shall file at the time of appearance an affidavit vesting in the person the requisite authority to bind the organization.<sup>23</sup>

It is made clear that any Rule 49(c)(11) exception is limited to representation of corporations in *small claims* and *landlord-tenant matters*. There is no exception that applies here, and so Mr. Havens is required to forthwith obtain licensed legal counsel familiar with the communication landscape.

### Rulings

Accordingly, IT IS ORDERED that Warren C. Havens shall cease and desist forthwith from acting as *pro se* representative in this case, whether in writing or verbally.

IT IS FURTHER ORDERED that **by 11 a.m. on 12 March 2012**, Warren C. Havens SHALL ADVISE in open court, or in writing or both, the name, place of bar admission, bar membership number, phone number and e-mail address of qualified communications legal counsel for representing Mr. Havens and the SkyTel entities in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION<sup>24</sup>



Richard L. Sippel  
Chief Administrative Law Judge

<sup>20</sup> D.C. App. R. 49(b)(2)(C).

<sup>21</sup> D.C. App. R. 49(b)(2)(D).

<sup>22</sup> D.C. App. R. 49(c)(11)(A).

<sup>23</sup> D.C. App. R. 49(c)(11)(B). No such document has been filed by SkyTel or Mr. Havens.

<sup>24</sup> Courtesy copies e-mailed to counsel and Mr. Havens on date of issuance.